

These are the tentative rulings for civil law and motion matters set for Thursday, July 11, 2013, at 8:30 a.m. in the Placer County Superior Court. The tentative ruling will be the court's final ruling unless notice of appearance and request for oral argument are given to all parties and the court by 4:00 p.m. today, Wednesday, July 10, 2013. Notice of request for oral argument to the court must be made by calling (916) 408-6481. Requests for oral argument made by any other method will not be accepted. Prevailing parties are required to submit orders after hearing to the court within 10 court days of the scheduled hearing date, and after approval as to form by opposing counsel. Court reporters are not provided by the court. Parties may provide a court reporter at their own expense.

EXCEPT AS OTHERWISE NOTED, THESE TENTATIVE RULINGS ARE ISSUED BY COMMISSIONER MICHAEL A. JACQUES AND IF ORAL ARGUMENT IS REQUESTED, ORAL ARGUMENT WILL BE HEARD IN DEPARTMENT 40, LOCATED AT 10820 JUSTICE CENTER DRIVE, ROSEVILLE, CALIFORNIA.

1. M-CV-0054994 Transworld Systems, Inc. vs. Gachago, Jeremy, et al

Plaintiff's unopposed Motion to Set Aside Dismissal is granted. The dismissal entered on February 7, 2013 is set aside.

2. M-CV-0055573 Thompson, Gerald vs. RJ Miles Company

This tentative ruling is issued by the Honorable Charles D. Wachob. If oral argument is requested, such argument shall be held at 8:30 a.m. in Department 42:

Defendant's Motion to Continue Trial and Compel Inspection

As an initial matter, the court notes that defendant filed a reply to the current motion on July 9, 2013. The court expressly stated in its June 26, 2013 ex parte order that no reply was permitted. The court strikes defendant's reply in its entirety.

Defendant has filed a single motion consisting of two separate, but intertwined, requests: a request to continue the current trial date 60 days in order to complete analysis of a concrete core sample, which is the subject of its motion to compel. The court notes that in seeking this relief, defendant has not moved, either explicitly or impliedly, to reopen discovery despite the practical effect granting either of these requests will have upon the action.

The court will first address the motion to compel inspection and concrete core sampling. A defendant may demand inspection, copying, testing, or sampling at any time. (*Code of Civil Procedure section 2031.020(a).*) Such a notice of demand still constitutes as discovery, which must be completed at least 30 days prior to the initial trial date. (*Code of Civil Procedure section 2024.020.*) The practical effect is that the notice

must be sent out a minimum of 60 days prior to trial. The demanding party may bring a motion to compel where a responding party fails to permit or produce the items sought in the demand. (*Code of Civil Procedure section 2031.320(a).*) In this instance, defendant noticed plaintiff of the demand on May 21, 2013 and plaintiff refused the demand on June 19, 2013. In reviewing the moving and opposing papers, the court surmises both parties could have proceeded with more efficiency and speed on this issue. Nonetheless, plaintiff's opposition to the request is not persuasive. He knew that defendant had tendered a notice of demand and while the demand is inartfully tailored, it included a response time of June 20, 2013; a date plaintiff tacitly acknowledges when he responded on June 19, 2013. Nor does the court find the basis for plaintiff's refusal to allow testing persuasive. In the June 19, 2013 response, plaintiff based his refusal, in part, on the fact that the core sampling would occur after the discovery cut-off. Plaintiff was aware that June 20, 2013 was the response deadline but did not inform defendant he would not comply until June 19, 2013. He was sufficiently noticed of the demand and should have permitted the core sampling. Based upon the foregoing, the motion is granted and the parties shall meet and confer to schedule an agreeable time and date for the completion of the concrete core sampling.

This still leaves the matter of monetary sanctions. The court shall also impose monetary sanctions on any party that unsuccessfully makes or opposes a motion to compel compliance with a demand unless substantial justification is shown. (*Code of Civil Procedure section 2031.320(b).*) Both parties could have taken steps to prevent the need for this motion; instead both proceeded with further expense and delay. While plaintiff inappropriately refused to comply with the notice of demand, his actions in opposing the current motion were substantially justified in light of the procedural missteps taken by the defendant. Therefore, the court declines to impose monetary sanctions against plaintiff.

The motion to continue trial is granted in light of the court's ruling on the motion to compel. The trial is continued to September 30, 2013 in a department to be assigned. A civil trial conference is also set for September 20, 2013 in Department 42.

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3. M-CV-0057126 Asset Acceptance, LLC vs. Radovich, Kris

Defendant's Demurrer is overruled. A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural*

Materials Co. (1981) 123 Cal.App.3d 593, 604.) A review of the complaint shows that it alleges sufficient facts to state a cause of action for common counts.

The defendant shall file and serve his answer or general denial on or before August 2, 2013.

4. M-CV-0057288 Cavalry SPV I, LLC vs. Bojorquez, Bertha

The Motion to File Amended Answer is continued to August 1, 2013 at 8:30 a.m. in Department 40. The defendant shall re-serve the motion for the continued hearing date and file a proof of service on or before July 19, 2013.

5. M-CV-0057454 Wells Fargo Bank, N.A. vs. Group Access, Inc.

Plaintiff's Application for Right to Attach and Writ of Attachment is denied without prejudice. The current application is filed within a limited civil case, which has a jurisdictional monetary limit of \$25,000. (CCP§85.) As the plaintiff has not sought reclassification of this limited civil action, the amount sought in the application exceeds the jurisdictional limit and cannot be granted.

6. M-CV-0057690 Brar, Jasbir S., et al vs. Fagundes, Patrick

Defendant's Motion to Stay Pending Determination of Remand to Federal Court is denied as moot in light of the order issued by the Eastern District on May 24, 2013, which remanded the case back to this court.

Defendant's Demurrer, or in the alternative, Motion to Abate Proceedings is overruled as to the demurrer and denied as to the motion to abate.

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) The complaint sufficiently pleads an unlawful detainer cause of action.

As for the request for abatement, the prerequisites of CCP§597 do not exist to provide a basis for such a motion. For all of these reasons, the demurrer is overruled and the motion to abate is denied.

Defendant shall file his answer or general denial on or before July 16, 2013.

7. M-CV-0058270 Sharifie, Farhad vs. Tack, Judy

Defendant's Demurrer to the First Amended Complaint (FAC) is overruled.

Plaintiff's request for judicial notice is granted pursuant to Evid C§452.

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) A review of the FAC shows that plaintiff has sufficiently alleged facts to state an unlawful detainer cause of action.

The defendant shall file and serve her answer or denial on or before July 16, 2013.

8. S-CV-0024808 Gonero, Alex vs. Union Pacific Railroad Co., et al

Plaintiff's Motion to Restore Case to Trial Calendar and Set for Trial is continued, on the court's own motion, to July 30, 2013 at 8:30 a.m. in Department 32 to be heard by the Honorable Mark S. Curry.

9. S-CV-0028282 U.S. Bank, N.A. vs. Alizadeh, Abolghassem, et al

Plaintiff's Motion to Compel Further Debtor Examinations and Production of Documents is denied. The witness at a judgment debtor examination is entitled to assert the same privileges as a trial witness. (*Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1002.) This includes the privilege against self-incrimination under the Fifth Amendment. (*Troy v. Superior Court* (1986) 186 Cal.App.3d 1006.) The defendants have asserted this privileged and the court shall not compel them to answer questions that violate the assertion of this privilege.

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10. S-CV-0028990 McGhee, Erina vs. Miller, Brad Robert, et al

Defendants Placer County and Placer County Sheriff's Dept's Demurrer to the First Amended Complaint (FAC)

Ruling on Request for Judicial Notice

Defendants' request for judicial notice is granted.

Ruling on Demurrer

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

The demurrer is sustained without leave to amend as it relates to defendant Placer County Sheriff's Dept. (Sheriff's Dept.). The court previously granted the Sheriff's Dept.'s motion for summary judgment on April 4, 2013. The court also denied a request for leave to amend as to the Sheriff's Dept.

As to the defendant Placer County, the demurrer to the second cause of action for wrongful death is sustained without leave to amend. The second cause of action fails in two respects. First, the plaintiffs failed to include the allegations in the FAC in their government claim. (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447.) Second, the FAC fails to allege sufficient facts that Placer County owed any duty, including a duty to warn, to the plaintiffs.

Defendant Telecare's Demurrer to the First Amended Complaint (FAC)

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

As to the fourth cause of action for wrongful death, the demurrer is sustained without leave to amend. The FAC fails to allege sufficient facts establishing that Telecare owed any duty, including a duty to warn, to the plaintiffs.

If oral argument is requested, defendant's request for telephonic appearance is granted. The defendant is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

11. S-CV-0031202 L'Amoreaux, Roger, et al vs. Baldwin Contracting Co., et al

As an initial matter, the court notes that the demurrer is withdrawn as to the fourth cause of action for breach of contract in light of the dismissal entered on June 14, 2013.

Cross-Defendant's request for judicial notice is granted.

A party may demur to a complaint where the pleading does not state facts sufficient to constitute a cause of action. (CCP§430.10(e).) A demurrer tests the legal

sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Bader v. Anderson* (2009) 179 Cal.App.4th 775, 787.) As such, the allegations in the pleadings are deemed to be true no matter how improbable the allegations may seem. (*Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.)

As to the second cause of action brought under the Hazardous Substance Account Act (HSAA), the demurrer is sustained without leave to amend. Health and Safety Code §25363 provides in pertinent part “[a]ny person who has incurred removal or remedial action costs in accordance with this chapter or the federal act may seek contribution or indemnity from any person who is liable pursuant to this chapter, An action to enforce a claim may be brought as a cross-complaint by any defendant in an action brought pursuant to Section 25360 or this section, or in a separate action after the person seeking contribution or indemnity has paid removal or remedial action costs in accordance with this chapter or the federal act.” The first amended cross-complaint fails to allege sufficient facts establishing that the cross-complainant “has paid removal or remedial action costs in accordance with [the HSAA] or the federal act.” (Health and Safety Code §25363; *Cooper Industries, Inc. v. Aviall Services Inc.* (2004) 543 U.S. 157; *BKHN, Inc. v. Department of Health Services* (1992) 3 Cal.App.4th 301, 310.)

The demurrer is sustained with leave to amend as to the third cause of action for contractual indemnity. As currently pled, the third cause of action appears to be barred by the statute of limitations and fails to allege any contractual terms or language that are applicable to this action. (*Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458-459.)

The second amended cross-complaint shall be filed and served on or before August 2, 2013.

If oral argument is requested, the parties' requests for telephonic appearance are granted. The parties are informed that they must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

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12. S-CV-0031486 Patel, Kanu U., et al vs. Berger, Scott A., et al

Plaintiffs' Motion to Amend Complaint is granted. The plaintiffs shall file and serve their first amended complaint on or before July 19, 2013.

13. S-CV-0032085 Benavidez, Randy, et al vs. Bank of America, N.A., et al

This tentative ruling is issued by the Honorable Michael W. Jones. If oral argument is requested, it shall be held at 8:30 a.m. in Department 43:

As an initial matter, the court grants defendants' request for judicial notice as to Exhibit A, B, C, E, F, and G pursuant to Evidence Code §452. The court denies the request as to Exhibit D.

A demurrer tests the legal sufficiency of the pleadings, not the truth of the plaintiff's allegations or accuracy of the described conduct. (*Picton v. Anderson Union High School* (1996) 50 Cal.App.4th 726, 733.) As such, all properly pled facts are assumed to be true as well as those that are judicially noticeable. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1153.) The FAC was filed on April 12, 2013 and alleges eight causes of action based upon predatory lending.

As to the first cause of action for deceit, second cause of action for breach of contract, third cause of action for promissory estoppel, and fifth cause of action for equitable accounting, the FAC alleges sufficient facts for each of these actions. Thus, the demurrer is overruled as to these causes of action.

For the remaining causes of action, the demurrer is sustained with leave to amend. As to the fourth cause of action, a negligence action requires a showing of duty, breach of duty, proximate cause, and damages. (*Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.) However, a lender is only liable for negligence where it "actively participates" by exceeding its scope "beyond the domain of the usual money lender." (*Nymark v. Heart Fed. Sav. & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) The FAC fails to sufficiently allege facts to establish that the moving defendants owed any duty to the plaintiff.

The sixth cause of action is for wrongful foreclosure pursuant to Civil Code §2923.5. However, the language within the notice of default is sufficient to comply with the requirements of the Civil Code. (Civil C§2923.5; *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208, 214-215.) The FAC does not allege sufficient facts to allege that the notice did not comply with Section 2923.5.

The seventh cause of action alleges violations under the UCL. "The UCL does not proscribe specific activities, but broadly prohibits any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. ...By proscribing 'any unlawful business practice,' section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable. Because section 17200 is written in the disjunctive, it establishes three varieties of unfair competition-acts or practices which are unlawful, or unfair, or fraudulent. In other words, a practice is prohibited as 'unfair' or 'deceptive' even if not 'unlawful' and vice versa." [Citations and quotations omitted.] (*Puentes v. Wells Fargo Home Mortg., Inc.* (2008) 160 Cal.App.4th 638, 643-644.) A plaintiff alleging unfair business practices must state with reasonable particularity the facts supporting the statutory elements of the violation. (*Khoury v. Maly's of California, Inc.* (1993) 14 Cal.App.4th 612, 619.) The fifth cause of action provides no stand alone

factual allegations, instead incorporating by reference the allegations made in the preceding causes of action. This leaves only the conclusory allegations that are insufficient to allege any factual basis for unlawful, unfair, or fraudulent acts or practices on the part of the moving defendants.

The final cause of action is for reformation of contract under Civil Code §1670.5. The applicability of Section 1670.5, often seen in reference to an affirmative defense, to allege a cause of action for unconscionability goes against the general function of the statute. As currently pled, there are insufficient facts to sustain the feasibility of this cause of action based upon Civil Code §1670.5.

To reiterate, the court overrules the demurrer as to the first, second, third, and fifth causes of action. The demurrer is sustained with leave to amend as to the fourth, sixth, seventh, and eighth causes of action.

A second amended complaint shall be filed and served on or before August 2, 2013.

If oral argument is requested, defendants' request for a telephonic appearance at the hearing is granted. The defendant is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

14. S-CV-0032618 U.S. Bank, N.A. vs. Lake Orta Corporation

Plaintiff's Motion to Strike is denied.

15. S-CV-0032900 Pontier, Connor - In Re the Petition of

The Petition to Approve Minor's Compromise is granted. If oral argument is requested, the minor's appearance at the hearing is waived.

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16. S-CV-0033168 Satrap, Gene, et al vs. Expo Floors, LLC, et al

Plaintiffs' OSC re Preliminary Injunction is denied.

Defendants' objection nos. 1, 7, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, and 20 are sustained. Defendants' objection nos. 2, 3, 4, 5, 6, 8, and 11 are overruled.

The court may grant a preliminary injunction when it appears from the complaint that the plaintiff is entitled to the demanded relief and the plaintiff would suffer

irreparable injury if the enjoined action were allowed to proceed. (CCP§526(a).) The plaintiff has the burden of showing he/she would be harmed if the preliminary injunction were not granted. (*Casmalia Resources, Ltd. v. County of Santa Barbara* (1987) 195 Cal.App.3d 827, 838.) When determining whether to issue a preliminary injunction, the court weighs the likelihood of whether the moving party will prevail on the merits and the relative interim harm to the parties from the issuance or non-issuance of the injunction. (*Hunt v. Superior Court* (1999) 21 Cal.4th 984, 999-1000.) The ruling is within the sound discretion of the trial court. (*Ibid.*)

The plaintiffs are unable to establish any irreparable injury that they will suffer as there is insufficient evidence presented to the court that establishes any harm or immediate harm that may result due to the allegations that water flow has affected the structural integrity of the masonry wall. Moreover, the plaintiffs are unable to establish they will prevail as to the private nuisance action. Private nuisance requires a showing of (1) an interference with a party's use and enjoyment of the property; (2) invasion of the party's interest in the use and enjoyment of the property that results in substantial actual damage; and (3) interference with the protected interest that is unreasonable in nature, duration, or amount. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938.) Plaintiffs have presented insufficient evidence establishing an interference with their use and enjoyment of the property and also fail to sufficiently establish any damage to their property. Based upon all of the foregoing, the preliminary injunction is denied.

The TRO issued on June 26, 2013 is dissolved forthwith.

17. S-PR-0000138 Koshman, Alex, Family Revocable Trust, In the Matter of

Appearance is required for hearing on Robert Koshman's motion for summary judgment, Robert Koshman's motion for sanctions, and Larry Koshman's motion to amend the 2008 trust petition.

Counsel for Robert Koshman, Larry Koshman and Angelo Tsakopoulos (and the Tsakopoulos-related entities) may appear by phone. Pursuant to Local Rule 20.8(A)(2), phone appearances for this calendar are through CourtCall.

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18. T-CV-0001684 Schlinger, Norman vs. Lamberth Construction, Inc

The Verified Application of Aaron S. Welling to Appear as Counsel Pro Hac Vice is granted.

If oral argument is requested, cross-defendant's request for telephonic appearance is granted. The cross-defendant is informed that it must make arrangements for the telephonic appearance through CourtCall pursuant to Local Rule 20.8.A.2.

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